STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 16, 2002
v	No. 228044 Calhoun Circuit Court
FRANKLIN BALLARD, Defendant-Appellant.	LC No. 99-001331-FH

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction on two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). We affirm.

On appeal, defendant argues that the trial court improperly admitted bad acts evidence relating to another sexual assault for which defendant was convicted. Although no evidence of the conviction was admitted, defendant asserts that the trial court abused its discretion in admitting evidence of the assault because its probative value was substantially outweighed by unfair prejudice. We disagree. The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Our Supreme Court, in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994), set forth the following multipart test to determine whether bad acts evidence is admissible:

> [f]irst, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Id*. at 55.]

Defendant does not dispute that the first requirement, offering the evidence for a proper purpose, was met. The second element of the test requires that the evidence be relevant under MRE 402. *VanderVliet, supra*. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Crawford, supra* at 388. With regard to evidence of a common plan or

scheme, our Supreme Court has explained that "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

Defendant argues that the bad acts evidence was not similar to the charged offense. We disagree. Both the present and previous offenses were perpetrated against members of defendant's choir, whom he frequently drove to various choir practices. The two young, African-American male victims looked up to defendant and frequently relied on him to drive them to and from practices. In the previous offense and the two current offenses, defendant isolated the victims from an area where others could find him. With the instant victim, defendant brought him to his basement, and later ordered his daughter to go upstairs to bed, leaving him alone with the victim. Moreover, in the second charged act with the present victim, defendant called the victim out from the living area in the basement to a bathroom. In the previous act with the other victim, defendant drove him home from a practice, and drove unusually slow, letting other drivers pass him by while he drove to an isolated area. As the prosecutor points out, defendant picked up these two boys and drove them to where the incidents took place.

Defendant also argues that the nature of the acts were too different for them to be evidence of common plan or scheme because in one incident he placed the victim's hand onto his own penis, but did not do that with the other victim. However, this alleged discrepancy does not diminish all of the similarities of the acts. In the first of the instant assaults, defendant reached over, unbuttoned the victim's pants and pulled out his penis. In the previous act, defendant reached across the car and touched that victim's penis. It is true that the first incident with the instant victim went further, and included defendant kissing the victim's chest, and that the second incident involved defendant asking the victim to rub lotion on his penis. However, the manner in which defendant began the first encounter with each boy was almost exactly alike. Moreover, in each encounter, defendant suggested to each boy that they should "hang out more" or that the acts should continue. We agree with the prosecution and the trial court that all three incidents show how defendant used his position of authority with the choir group to develop a sense of trust with the two victims and, thus, were sufficiently similar to support an inference of a common plan or scheme.

The third requirement under the test for MRE 404(b) evidence requires a determination that the unfair prejudice of the proffered testimony does not outweigh the probative value. *VanderVliet*, *supra*. "Unfair prejudice" does not mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). Any relevant evidence will be prejudicial to some extent. Rather, as the Supreme Court pointed out, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, *supra* at 398.

Defendant asserts, generally, that the prejudicial effect of admitting this evidence outweighs its probative value. However, other than a general statement that the admission of the evidence "amounted to improper character evidence, inviting the jury to convict [defendant] because he was an alleged serial child molester," defendant fails to show how the probative value of such evidence is outweighed by any unfair prejudice. We agree that the evidence is prejudicial, but not that the prejudice is unfair. Therefore, we conclude that the trial court did not

abuse its discretion in admitting evidence of another sexual assault defendant committed because it shows a common plan or scheme.

Defendant next argues that the trial court abused its discretion by denying his motion to disqualify itself. We disagree. On appeal, this Court reviews the trial court's findings of fact on a motion to disqualify a judge for an abuse of discretion and the application of the facts to the law de novo. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). "Absent actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified." *Id*. A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id*.

Here, defendant fails to establish actual bias or prejudice. Defendant identifies two grounds that he argues amounts to bias on the part of the trial court. First, defendant claims that the trial court should not have informed the jurors in a previous trial that defendant had a prior conviction. However, defendant does not dispute that the conversation in which the judge informed the jurors of that fact occurred after the jury was deemed to be deadlocked and dismissed. Defendant does not assert that the trial court cannot communicate with jurors about the case after the jurors have been dismissed. Moreover, defendant did not assert any impropriety with the trial judge and the jurors who ultimately convicted him. Therefore, defendant fails to show how the trial judge's communication with dismissed jurors overcomes the presumption of judicial impartiality.

Next, defendant claims bias because of the seemingly disparate rulings of the trial court when it first denied admission of the bad acts evidence, but then later admitted the evidence. However, the language of each order makes it clear why the court ruled differently on the same issue. The first order, denying admission of the bad acts testimony, was made because "the Prosecution failed to subpoena its witnesses" for the hearing. The judge never addressed the merits of the issue. However, the prosecution properly subpoenaed its witnesses before the second trial, and the trial court addressed the merits of admitting the evidence. Therefore, defendant failed to demonstrate grounds for disqualification.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell